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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1139

THE FIRST NATIONAL BANK OF GREELEY, COLORADO, as the Executor and Trustee of the Last Will and Testament of WILLIAM LABRECHT INSINGER (sometimes known as W. A. Insinger), deceased; FRED STRONG; ARTHUR STRONG; JOHN STREET; MARY STREET; ALBERT SANDERS; C. D. CUTLER; I. B. MELVILLE; and ERRETT L. DILL, Petitioners,

vs.

MINNESOTA MINES, INC., a Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI, ASSIGNMENTS OF ERROR AND SUMMARY STATEMENT.

IRVING B. MELVILLE,
Security Building, Denver, Colo., Attorney pro se, and Attorney for the Other Petitioners Herein.

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Sections 15 and 25 of Colorado Constitution
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vs.

MINNESOTA MINES, INC., a Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI.

Come now your petitioners and request that a Writ of Certiorari issue out of this Court to review the final judgment of the supreme court of the state of Colorado in Cause No. 14,955, in which your petitioners are plaintiffs in error and respondent is defendant in error—and, as grounds

for such request, petitioners assert that they have been deprived of their property without due process of law, and have been denied the equal protection of the law, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Respectfully submitted,

(Signed)

IRVING B. MELVILLE,

Security Building, Denver, Colorado, Attorney pro se, and Attorney for the Other Petitioners herein.

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THE FIRST NATIONAL BANK OF GREELEY, COLORADO, as the Executor and Trustee of the Last Will and Testament of WILLIAM LABRECHT INSINGER (sometimes known as W. A. Insinger), deceased; FRED STRONG; ARTHUR STRONG; JOHN STREET; MARY STREET; ALBERT SANDERS; C. D. CUTLER; I. B. MELVILLE; and ERRETT I. DILL, Plaintiffs in Error,

vs.

MINNESOTA MINES, INC., a Corporation, Defendant in Error.

ASSIGNMENTS OF ERROR.

Come now your petitioners and make known to this Court that the supreme court of the state of Colorado committed grievous errors in affirming the orders and judgments of the trial court, and repeated such errors in denying the petition for a

rehearing presented and argued therein, in holding:

1. That the channel of a natural stream in Colorado can be used by a private mining and milling corporation for storing the slimes and tailings from its metalliferous reduction mill.

2. That said private corporation can take a portion of a patented placer claim, belonging to individuals owing a group of patented lode mining claims and operating the same with a like metalliferous reduction mill, so as to utilize the entire bed and channel of said natural stream and thereby prevent the latter from making use of slime and tailing ponds located lower down on said placer claim.

3. That creating such slime and tailing ponds in the bed and channel of said public stream, by the private corporation, did not deprive said private owners of the use of the balance of said placer claim for their slime and tailing ponds.

4. That the taking of the channel of said public stream for slime and tailing ponds, by said private corporation, affected said stream with a public interest for the benefit of the general mining interests in Colorado.

5. That the benefits to said private corporation far outweigh the detriments to said private owners.

6. That the order of the trial court giving said private corporation possession of said portion of said placer claim without any notice to said pri-

vate individuals, and without giving them a hearing, was legal and proper.

7. That said private mining corporation was justified in intercepting the natural underground drainage water, which from time immemorial had been used by said private owners and their predecessors in ownership in mining and milling their said lode mining claims.

That each of said errors so committed was and is contrary to the express provisions of Art. II, Sections 15 and 25, of the Colorado constitution, to the Eminent Domain Act, and to the *stare decisis* decisions of its appellate courts, and is in contravention of Section 1 of Article XIV, of the Amendments to the Constitution of the United States.

IRVING B. MELVILLE,
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Other Petitioners Herein.

SUMMARY STATEMENT.

A brief statement of the facts appearing in the Record show that proceeding is a controversy between two owners of separate groups of patented mining claims in the Upper Union Mining District located in Clear Creek County, Colorado, of sufficient number and location to control by artificial means the available water supply arising from the drainage area formed by Covode Mountain merging into Silver Mountain approximately two miles west of the Town of Empire.

Silver Mountain contained that portion of the fabulous gold that started the mining boom of the early "Sixties" in Clear Creek County, and has continued to attract miners and mining capital up to and including this time.

In connection with these two groups of claims, each of the owners maintained and operated an ore reduction mill on opposite sides of Silver Mountain, and, under the Colorado law, each was required to so dispose of the slimes and tailings from the operated mill so as not to contaminate the natural streams of the State or interfere with the lawful milling operations of the other.

So far as the pleadings, the orders, the judgment, the exhibits, and the testimony is concerned, there is no material conflict between the petitioner and the respondents—the differences existing concern the constitution and statutory law and *stare decisis* opinions of the appellate courts of Colorado, and due process of law thereunder and under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

In 1937 the General Assembly of Colorado enacted a law commonly designated as the Act of '37 (S. L. '37, pages 850-851), the title of which reads:

> "AN ACT PROVIDING FOR THE ACQUISITION BY PERSONS AND CORPORATIONS ENGAGED IN THE BUSINESS OF MINING AND MILLING ORES, OF RIGHTS OF WAY FOR FLUMES, DITCHES, PIPE LINES, AND CONDUITS FOR THE CONVEYANCE OF WATER AND MILL TAILINGS AND WASTE AND FOR THE TAKING OF LAND FOR RESERVOIRS FOR SETTLING AND STORING TAILINGS AND WASTE, AND PROVIDING THE RIGHT OF EMINENT DOMAIN THEREFOR AND THE MANNER OF EXERCISING SAID RIGHTS."

The entire title and body of the Act is set forth at pages 5-6 of the Rehearing Brief.

Your petitioners contend that said Act is unconstitutional because it is in contravention of that portion of Article II, Section 15, of the Constitution of Colorado, reading:

> "and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public *shall be a judicial question,* and determined as such *without regard to any legislative assertion* that *the use is public.*" (Italics ours.)

The wording of the title and the body of the Act clearly show that any person or corporation engaged in private mining and milling would take advantage of its terms for a private, and not a public, purpose—which in the instant case is unequivocally shown by the petition in condemnation.

The material allegations of the petition in condemnation are set forth at pages 3-5 of the Rehearing Brief; and, further stripped of nonessentials, reads:

> Petitioner is a mining and milling corporation of gold ores, and, in the operation of its mill, large quantities of tailings are and will continue to be discharged; and, without such discharge, it will be impossible to operate said mill. In continued operation, it will be necessary to deposit and store said tailings to prevent them reaching the public streams.
>
> It has become necessary to enter upon, take by condemnation and use the land described for the purpose of constructing and operating a dam and reservoirs to be used for the settling and deposit and storage of said tailings. The land so condemned is the westerly end of the Coupon Placer, and is not being used by the owners for any purpose. The portion sought will not injure the remaining portion, and the appropriation of said tract will be of great benefit and advantage to the mining industry of Clear Creek County.

The Abstract of the Record (pp. 11-14) shows that, without any notice of any kind to respondents, the petition for condemnation was presented to the trial judge in vacation on March 5, 1940, who on the same day entered an order giving petitioner immediate possession of the land in controversy for the purpose of constructing thereon and thereover a dam, reservoir and tailing ponds during the pendency of the proceedings; and, an addi-

tional order, restraining respondents from in any manner interfering with petitioner in the performance of such work.

That thereafter, and on the same day, the court ordered summons issued to respondents to appear in said court on May 7, 1940, to show cause against the condemnation of said land for the purpose of storing and retaining tailings from petitioner's mill located in the Upper Union Mining District in Clear Creek County, Colorado—including therein a complete description of the land.

The testimony of petitioner's vice-president, treasurer and manager (Abst. p. 73) shows that just as soon as the order was obtained on March 5, 1940, he proceeded at once with the construction of the dam, which was completed in early May following.

The Abstract (pp. 15-17) shows that on the return day, May 7, 1940, respondents filed their motion to vacate the order for possession; and at the same time (p. 17) one of the attorneys for petitioner asked for, and obtained, permission to file an amended petition in condemnation within ten days thereafter, and have an alias summons issued.

The Abstract (p. 17) shows that an order was entered making said alias summons returnable on June 21, 1940, and that respondents, after said amended petition had been filed, on May 28, 1940, filed their motion to vacate said order of possession under the amended petition (Abst. pp. 18-21); and, *inter alia*, therein alleged that for more than

forty years last past they and their predecessors in ownership had owned and operated parts of the sixteen patented lode mining claims, mill site and placer claims located in the Upper Mining District in Clear Creek County, Colorado; and for approximately three years last past respondents have been actively engaged in mining said property, and milling the ores taken therefrom, and, it is now necessary to use the land for the deposit of tailings from their mill, which land is now sought by petitioner. That petitioner has been engaged since the year 1934 in a similar line of mining and milling a short distance above their mill on the west side of Silver Mountain, and has lands of its own on which it has been depositing tailings.

That the court is without jurisdiction to enter an order to a private mining and milling corporation for possession of land for tailing ponds prior to a trial on the right of such action, being in violation of article II, Sections 15 and 25, of the constitution of Colorado, and constitutes taking respondent's property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

The Abstract (pp. 21-25) shows that before any testimony or other evidence was presented or any joint hearing of the parties, respondents at the opening of court on December 11, 1940, asked permission to file and present their cross-petition (Abst. pp. 21-27), which permission was granted subject to the right of petitioner to thereafter attack it (Abst. p. 29).

The cross-petition *inter alia* includes the Empress Tunnel group of patented lode, placer, and mill site mining claims described in the preceding motion to vacate the order of possession; and, the cross-petition then *inter alia* states that Errett I. Dill has been operating both the Empress Tunnel and the Empire Tunnel Groups of patented mining claims under a mining lease and option to purchase, of date August 22, 1938, and has expended approximately $83,000 of capital and approximately $9,000 of earnings on said properties up to the present time in opening up new bodies of ore and in modernizing the reduction mill.

That the reduction mill was constructed at a planned capacity of 200 tons per day, and is located on North Empire Creek. That respondents and their predecessors in interest have appropriated and used the water therefrom all this time, and now own and have the prior right to use the water for said beneficial purpose.

The above motion to vacate the order of possession and the cross-petition directly challenge the right of petitioner to maintain its action, and your petitioners contend that under such showing it was the duty of the trial court to first determine that issue before proceeding further with the hearing.

The Abstract (p. 122) shows that the trial court overruled the motion to vacate the order of possession, and sustained petitioner's motion to dismiss the cross-petition.

Your petitioner's contention here is that said

rulings of the trial court deprived them of their property without due process of law, in that neither a board of commissioners nor a jury would have an adequate basis for assessing respondents' damages in this proceeding, and further contend that each order constituted a final judgment—and so are the authorities cited on pages 19-21, 25-26, 37-39, and 45-48, of the Rehearing Brief.

These two orders deprived respondents of their property without due process of law, and were and are each in contravention of Sections 15 and 25 of the constitution of Colorado and of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The latter part of Section 2 of the 1937 Act reads:

> "and when the parties cannot agree upon such right of way or reservoir site or the amount of compensation to be paid therefor, all such persons or corporations are hereby vested with the power of eminent domain and are hereby authorized to proceed to acquire such rights of way for flumes, ditches, pipe lines, conduits and reservoir site, *in the manner now provided by law for the exercise of the right of eminent domain.*" (Italics ours.)

The "right of eminent domain" referred to is the original twenty sections of the eminent domain act passed by the first general assembly of the then new State of Colorado; and was authorized to be, and was, included in the official 1877 General Laws of Colorado, under the heading "Eminent Domain".

The same twenty sections, with slight changes made by various later legislatures, has appeared in the official Code of 1883, the 1908 Revised Statutes, the 1921 Compiled Laws, and now appear as sections one to twenty in 3 C. S. A., pages 175-206, under the same heading.

The petition *was presented in vacation and included both resident and non-resident joint owners* in the land condemned.

Section 3 of the eminent domain act (3 C. S. A., p. 181, §3), reads:

> "If such petition be presented to a judge in vacation, the judge shall note thereon the day of presentation, and shall also note thereon the day when he will hear the same, and shall order the issuance of a summons to each resident defendant, and the publication of notice to each non-resident defendant, and the clerk of the court shall at once issue the summons and give notice accordingly."

Section 4 (3 C. S. A., p. 181, §4) *inter alia* reads:

> "When it appears that the owners, or any of them, of the property sought to be condemned, are non-residents • • • the court or judge shall order a notice to be published • • • addressed to such owner or owners, in which notice shall be stated the name of the petitioner or petitioners, a full and accurate description of the property sought to be condemned, the purpose for which such condemnation is asked, and the time and place when

such owner or owners are required to appear, and the title of the court, or name of the judge, before whom said application is to be heard. The court or judge shall also fix and determine when said notice shall be made returnable, but in no case shall it be made returnable in less than thirty days, and the same shall be published at least four times in some weekly newspaper before the return day thereof."

Section 5 (3 C. S. A., p. 182, §5) *inter alia* reads:

> "Causes may be heard by such judges in vacation as well as in term time, *but no cause shall be heard earlier than ten days after service upon defendant, or upon due publication against non-residents.*" (Italics ours.)

Section 6 (3 C. S. A., p. 184, §6) *inter alia* reads:

> "The court or judge may adjourn the proceedings from time to time, shall direct any future notice thereof to be given that may seem proper, *shall hear proofs and allegations of all parties interested* touching the *regularity of the proceedings.*" (Italics ours.)

The appellate courts of Colorado have consistently and repeatedly held that, when the question of the regularity of the proceedings is raised i. e. the right of the petitioner to bring the action, such question must be determined *in limine*—for if the action cannot be maintained the proceeding is

at an end without further expense. See authorities cited at pages 21-24 of the Rehearing Brief.

Various special acts empowering corporations and persons engaged in different lines of business affecting the public interest have been passed by the general assembly from time to time, but always under a separate title specifying the particular industry, such as appears in the session laws of 1885 (S. L. '85, pp. 358-359, §§1-5), the title reading:

> "AN ACT TO FACILITATE THE CONSTRUCTION OF TELEGRAPH, TELEPHONE, AND ELECTRIC LIGHT LINES."

Section 4 of the act reads:

> "That whenever such telegraph, telephone or electric light company, on application thereof, to secure by contract or agreement, such right of way for the purposes aforesaid, over the land, privileges or easements of another person or corporation, it shall be lawful for such telegraph, telephone or electric light company to acquire such title in the *manner provided by law, for the exercise of eminent domain.*" (Italics ours.)

The last above act was amended in 1907 (S. L. '07, pp. 282-286, §§1-16) under a title reading:

> "AN ACT GRANTING THE EXERCISE OF EMINENT DOMAIN TO TUNNEL TRANSPORTATION COMPANIES, PIPE LINE TRANSMISSION COMPANIES, ELECTRIC POWER TRANSMISSION COMPANIES AND AERIAL TRAMWAY COMPANIES."

The body of the act appears in 3 C. S. A., Chap.

61, pp. 208-211, §§26-41, verbatin with the 1907 Session Laws—Section 32 of the former and Section 7 of the latter reads:

> "Any such corporation shall make due and just compensation for such right of way to the owners of the property through which it is proposed to construct, operate and maintain such tunnel, pipe line, electric transmission line, or aerial tramway, and when the parties cannot agree upon such right of way and the amount of compensation to be paid the owner of such property, *the same shall be determined in manner as now provided by law for the exercise of the right of eminent domain.*" (Italics ours.)

The 1907 general assembly passed another act at the same session (S. L. '07, pp. 385-388, §§1-8), and added Section 9 repealing the foregoing act of 1885—the title reading:

> "AN ACT TO FACILITATE THE CONSTRUCTION OF TELEGRAPH, TELEPHONE, ELECTRIC LIGHT POWER AND PIPE LINES, PROVIDING THE RIGHT OF EMINENT DOMAIN THEREFOR, AND DEFINING THE RELATION OF PERSONS OR CORPORATIONS SEEKING SUCH RIGHTS OF WAY TO PERSONS OR CORPORATIONS ALREADY OWNING SUCH RIGHTS OF WAY, INCLUDING THOSE OWNING OR USING AND THOSE SEEKING TO OWN AND USE RIGHTS OF WAY FOR THE TRANSMISSION OF ELECTRIC OR OTHER POWER."

The last act appears verbatim in 3 C. S. A., Chap. 61, pp. 211-213, as Sections 42-49; and Section 46 reads:

> "Such telegraph, telephone, electric light power or pipe line company is hereby vested with the power of eminent domain, and authorized to proceed to obtain rights of way for poles, wires, pipes and systems for the purposes aforesaid by means thereof, and whenever such company shall be unable to secure by deed, contract or agreement such rights of way for the purposes aforesaid, over, under, across and upon the lands, property, privileges, rights of way or easements of persons or corporations, it shall be lawful for such telegraph, telephone, electric light power or pipe line company to acquire such title in the *manner now provided by law for the exercise of the right of eminent domain* and in the manner as set forth in Sections 42 to 49 of this chapter."

It is apparent from the form of the petition in condemnation that the same was presented in attempted compliance with the last above amended act, although petitioner alleges that the company is engaged in mining and milling gold and desires the land of respondents for *constructing thereon and thereover a dam, reservoir and tailing ponds.*

The construction and maintenance of the electric lines and aerial tram would cause only an inconvenience to the owner, while petitioner's tailing ponds completely destroy the use of the entire Coupon placer, as shown from the exhibits and testimony (see Abst. pp. 29-116 and preliminary notes of exhibits, pp. iv-xiv).

THE CHANNELS OF THE PUBLIC STREAMS OF COLORADO CANNOT BE USED FOR MILL TAILINGS.

From territorial days continuously without amendment we find the following paragraph, from 4 C. S. A., Chap. 110, p. 147, Section 186—reading:

> "In no case shall any person or persons be allowed to flood the property of another person with water, or wash down the tailings of his or their sluice upon the claim or property of other persons, but it shall be the duty of every miner to take care of his own tailings, upon his own property, or became responsible for all damages that may arise therefrom."

The reason why the channel of Clear Creek was selected for petitioner's tailing ponds is first given by its manager, vice-president and treasurer, who testified (abst. pp. 69-70):

> "That in the Spring and Summer of 1940, 90 per cent of our old tailing ponds were filled, and we had to have new storage capacity to keep in operation, as the Company has had a permanent injunction against it for the last three or four years, and last Spring we had a citation for contempt for pollution of the stream. We spent a lot of time during the winter examining all possible sites for new tailing ponds, and arrived at the conclusion that the best place to put a pond was in the bottom of the old channel of Clear Creek, and to divert the creek around this section by dig-

> ging a new channel. We felt that the cost of that work would give us, dollar for dollar, a greater storage capacity than any other expenditure that we could make."

Petitioner's construction engineer, Harrington (abst. p. 92), in answer to the question if he could explain why they put the tailings in the bed of a public stream, answered:

> "Yes. That was the most handy, the cheapest place, the largest capacity and the smallest cost."

The decisions of the Colorado appellate courts on this point of law appear at pages 27-34 of the Rehearing Brief.

CAN ANY PART OF A PLACER, OWNED AND NEEDED BY ONE FOR A TAILING POND, BE CONDEMNED BY ANOTHER FOR LIKE USE?

There is no serious conflict in the testimony or other evidence that respondents require the full use of the channel of Clear Creek for the continued flow of the stream, and require the balance of the Coupon placer for their tailing ponds (abst. pp. 29-116 and explanatory notes pp. iv-xv).

In such circumstances it would seem that the mere statement of the facts would require the answer to be "No"—and so are the authorities.

See pages 37-38 and pages 38-41 of the Rehearing Brief for authorities.

CAN THE OWNER OF MINING CLAIMS SO USE HIS PROPERTY AS TO DESTROY THE NATURAL CONDITION OF THE MINING CLAIMS OF ANOTHER?

The answer is "No", and so are the authorities found at pages 38-41 of the Rehearing Brief—and see testimony of Melville, abst. pages 39-41, and the testimony of Clifford, manager, vice-president and treasurer of petitioner, abst. pages 77-80.

PETITIONER'S THEORY OF THE CASE.

Petitioner was permitted to show that the mining and milling of the Empress Tunnel Group of Mining Claims was not and never had been a financial success; that such property was not now operated by respondents but by leasers; that the benefits to petitioner far outweigh the detriments to respondents; that nothing had been done in connection with the Empire Tunnel Group of Mining Claims in the way of utilizing the water power theretofore used in connection therewith, and had allowed the dam to deteriorate—while respondents did not admit such allegations, except that the dam was in bad repair at the present time, they took position that none of such testimony or evidence was material—and so are the authorities.

See authorities pages 49-53 of Brief on Rehearing.

EXPENSE IN DEFENDING ACTION.

Respondents have been put to a great expense in connection with the defense of such proceeding, and Section 15 of Article II of the Colorado Constitution *inter alia* provides that private property shall not be taken or damaged for public or private use without just compensation, and respondents should be entitled to their actual expense in defending such proceeding—and so are the authorities.

See authorities cited on pages 54-59 of the Rehearing brief.

CONCLUSION.

Respondents contend that they have been deprived of their property and property rights without due process of law and contrary to the *stare decisis* opinions of the appellate courts of Colorado, and in contravention of sections 15 and 25 of the constitution of the state of Colorado, and of section 1 of the Fourteenth Amendment to the Constitution of the United States.

In support thereof, in addition to the authorities heretofore cited, they further submit the following cases of the supreme court of the United States:

West River Bridge v. Dix et al, 6 How. 507, 535, 47 L. ed. 535, 547.

Hairston v. Danville & W. R. Co., 208 U. S. 598, 606, 52 L. ed., 627, 641.

Rindge Co. v. Los Angeles County, 262 U. S. 700, 705, 67 L. ed., 1186, 1192.

Respectfully submitted,

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